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Supreme Court of the United States

OCTOBER TERM, 1903

No. 372

HENRY O. HOUGHTON, Trustee, GEORGE H. MIFFLIN, J. MURRAY KAY, et al., Appellants

vs.

HENRY C. PAYNE, Postmaster-General

Brief for Appellants

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Supreme Court of the United States.

No. 372.

HENRY O. HOUGHTON, *Trustee*, GEORGE H. MIFFLIN, J. MURRAY KAY, ET AL., *Appellants*,

vs.

HENRY C. PAYNE, *Postmaster-General.*

BRIEF FOR APPELLANTS.

STATEMENT OF THE CASE.

THE question involved is whether certain "periodical publications" published by the appellants, and called "Riverside Literature Series," are entitled to be carried in the mails as mailable matter of the second class.

The case was heard on Bill and Answer in the Supreme Court of the District of Columbia, and on inspection by the Court of certain publications of the appellants which by stipulation (Record, page 12) were admitted for inspection. On March 10, 1903, a final decree was made by that Court, by which it was adjudged that complainants (appellants) were entitled to have their publications entitled "Riverside Literature Series" received and transmitted through the mails as mailable "matter of the second class."

On appeal to the Court of Appeals of the District of Columbia, that Court, on June 5, 1903, reversed the judgment of the lower court under a decree remanding the cause, with directions to dismiss the bill. The case is here on appeal from that decree.

BRIEF OF THE ARGUMENT.

The provisions of the statutes, the construction of which is presented, are as follows: —

Supplement to Rev. St. Vol. 1, page 454. Act of March 3, 1879, ch. 180.

"SEC. 7. That mailable matter shall be divided into four classes: —

First, written matter;

Second, periodical publications;

Third, miscellaneous printed matter;

Fourth, merchandise.

"SEC. 8. Mailable matter of the first class shall embrace letters, postal cards, and all matters wholly or partly in writing, except as hereinafter provided.

"SEC. 10. That mailable matter of the second class shall embrace all newspapers and other periodical publications which are issued at stated intervals, and as frequently as four times a year, and are within the conditions named in sections 12 and 14.

"SEC. 12. That matter of the second class may be examined at the office of mailing, and if found to contain matter which is subject to a higher rate of postage, such matter shall be charged with postage at the rate to which the inclosed matter is subject;

"Provided, That nothing herein contained shall be so construed as to prohibit the insertion in periodicals of advertisements attached permanently to the same.

"SEC. 14. That the conditions upon which a publication shall be admitted to the second class are as follows: —

"*First.* It must regularly be issued at stated intervals, as frequently as four times a year, and bear date of issue, and be numbered consecutively.

"*Second.* It must be issued from a known office of publication.

"*Third.* It must be formed of printed paper sheets, without board, cloth, leather, or other substantial binding, such as distinguish printed books for preservation from periodical publications.

"*Fourth.* It must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry, and having a legitimate list of subscribers;

"Provided, however, That nothing herein contained shall be so construed as to admit to the second-class rate regular publications designed primarily for advertising purposes, or for free circulation, or for circulation at nominal rates.

"SEC. 17. That mail matter of the third class shall embrace books, transient newspapers, and periodicals, circulars, and other matter wholly in print (not included in section 12), proof-sheets, corrected proof-sheets, and manuscript copy accompanying the same, and postage shall be paid at the rate of one cent for each two ounces or fractional part thereof, and shall fully be prepaid by postage stamps affixed to said matter."

The rate of postage for second-class matter was fixed by this Act at two cents a pound or a fraction thereof, and was by Act of March 3, 1885 (23 St. 385), reduced one half, to one cent a pound or a fraction thereof.

Apparently, soon after this reduction in rate was made, the publishing firm of Houghton, Mifflin & Co., of Boston, conceived the idea that if a series of periodical publications, devoted to the publication of the best examples in prose and poetry of English literature, was cheaply and well printed by them and issued in compliance with the provisions of the Statute of 1879, it could, under the reduced rates for such publications provided in the Statute of 1885, be placed in the hands of subscribers at a cheap price, but with a margin of profit, as a mercantile venture.

Horace E. Scudder, a man of well-known reputation as a literary editor, was made supervising editor.

A sufficient number of subscribers was obtained and the enterprise was started by the publication of the first number on March 17, 1886.

The series was published weekly at a quarterly subscription of $1.60 until July, when it was changed to monthly, at yearly subscription of $1 25.

In 1889 it was changed to quarterly, with yearly subscription of fifty cents. In 1894 it was changed to semi-monthly, with yearly subscription of $2.50 until May 4, 1895, when subscription became $5 and continued until 1897, when the issue was changed again to monthly, with yearly subscription of $1.35. In 1900 it was again changed to quarterly, with yearly subscription of fifty cents.

At its inception and at each change of periodicity an examination was had by the Post-Office Department and a determination was made by the then Postmaster-General that the publications complied with the require ments of the Statute relating to mailable matter of the second class, and for sixteen years previous to the filing of this bill it has been so classified and carried in the mails.

The publications themselves are devoted to that sort of literature which is of the greatest use in the public and private schools of the United States.

The material, as inspection will disclose, has been most carefully selected by the general editor.

The different numbers have been specially edited, either by him or by some one selected by him, and provided with biographical sketches, introductions, notes, vocabularies, maps, and illustrations, and constitute an educational periodical of the very highest class.

The editorial work done on the series, consisting of such careful selection of material and such careful preparation of new auxiliary matter, has rendered possible the immense circulation which never could have been secured for mere reprints.

FACTS STATED IN THE BILL.

The facts stated in the bill, none of which are denied by the answer, show that the appellants, a publishing firm of Boston, Mass., owners of the "Riverside Press" at Cambridge, and doing business under the name of Houghton, Mifflin and Company, March 17, 1886, began and have continued to the present time the publication of a series of periodical publications known as "Riverside Literature Series."

That these publications are regularly issued at stated intervals as frequently as four times a year, bear date of issue, are numbered consecutively, and are issued from a known office of publication. That these publications are formed of printed paper sheets, without board, cloth, leather, or other substantial binding such as distinguish printed books for preservation from periodical publications.

That they are devoted to literature, have a legitimate list of subscribers, and are not designed primarily for advertising purposes or for free circulation at nominal rates.

That since March 17, 1886, for a period of more than sixteen years, these publications have been entered and admitted by successive Postmaster-Generals of the United States as mailable matter of the second class, the last certificate being made at Boston, September 15, 1900 (Record, page 3).

That on April 4, 1902, the appellants were notified to show cause why these publications —

"should not be denied second-class rates of postage under provi-
"sions of sec. 276, Postal Laws and Regulations (a copy of which is
"inclosed), on the ground that your publication has the characteris-
"tics of books."

That argument and evidence that these publications should not be denied second-class rates on account of their having the characteristics of books were submitted to the Third Assistant Postmaster-General, and on May 5, 1902, they were notified that the certificate of entry as second-class matter was canceled for the reason, —

"failure to establish that your publication comes within the pro-

"visions of the postal laws and regulations for acceptance in the "mails as second-class matter."

That the appellants were then bound under existing contracts to supply upwards of two million of these publications at a price based upon the postage rates chargeable upon them by the decisions of the Postmaster-General and his predecessors in office in regard to these particular publications, extending over an unbroken period of sixteen years, and the summary action then threatened to be taken by the Postmaster-General would have exposed them to great pecuniary loss and damage.

The Answer does not deny any of the facts set forth in the Bill but sets up as defense to the Bill, —

(1) That these publications do not constitute a periodical publication within the intent and meaning of the Statute defining the classes of mailable matter, and that although they comply with the external characteristics and conditions of the second-class mail matter, nevertheless, internally and in substance they have not the characteristics of second-class matter, but have the characteristics of books, and are, in fact, books.

(2) That whether they do comply with the conditions and requisites for admission is a question wholly within the competence and jurisdiction of the Postmaster-General, the determination of which is within the judgment and discretion of the Postmaster-General for the time being, and is not subject to review by the Court.

DISCRETION OF THE POSTMASTER-GENERAL.

In the case of Payne *vs.* National Publishing Co., 20 Appeals D. C. 581, the Court of Appeals said on this question : —

"It is very clear that the Congress of the United States has not "committed to the Postmaster-General, or to any one else, the mat-"ter of determining what should be carried in the mails as second-"class matter, and what as matter of the third class. It has re-"served the power exclusively to itself. It has itself made the classi-"fication, and it is not competent for the Postmaster-General to add "anything to the Statute or to take anything from it. It may be even "that the privileges of the mails had been greatly abused by the in-"troduction into them of mail matter of the second class which was "never anticipated by Congress. . . . The Postmaster-Generals who "for many years have been appealing to Congress for some remedy "for what they designate as an abuse to the second-class mail-matter